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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Regarding Policies,)
Procedures and Rules for Regulation of Physical) R.15-06-009
Security for the Electric Supply Facilities of)
Electrical Corporations Consistent with Public)
Utilities Code Section 364 and to Establish Standards)
for Disaster and Emergency Preparedness Plans for)
Electrical Corporations and Regulated Water)
Companies Pursuant to Public Utilities Code Section)
768.6.)

**REPLY BRIEF OF THE
CALIFORNIA MUNICIPAL UTILITIES ASSOCIATION, THE LOS
ANGELES DEPARTMENT OF WATER AND POWER, NATIONAL
RURAL ELECTRIC COOPERATIVE ASSOCIATION, AND THE
SACRAMENTO MUNICIPAL UTILITY DISTRICT**

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Dated: February 9, 2018

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In accordance with the *E-Mail Ruling Allowing the Parties to File Legal Briefs*
Concerning the Commission's Jurisdiction Over Publically Owned Electrical Utilities and Rural
Electric Cooperatives, dated January 3, 2018, the California Municipal Utilities Association
("CMUA"), the Los Angeles Department of Water and Power ("LADWP"), the National Rural
Electric Cooperative Association ("NRECA"), and the Sacramento Municipal Utility District
("SMUD") (collectively, "Joint Parties") respectfully submit this Reply Brief.

I. REPLY TO OPENING BRIEFS

On January 26, 2018, opening jurisdictional briefs were filed by the Office of Ratepayer
Advocates ("ORA") and by the Safety and Enforcement Division ("SED"). As described below,
neither SED nor ORA provide support for Commission jurisdiction over publicly owned electric
utilities ("POUs") for purposes of adopting regulations for the physical security of POU electric
supply facilities.

A. ORA and SED Make Broad Assertions of General Safety Jurisdiction Without Any Legal Support.

Both ORA and SED make various inconsistent assertions of jurisdiction throughout their briefs. However, both include extraordinarily broad statements of the Commission's authority. SED states: "The Commission Has Jurisdiction Over Local Publicly Owned Utilities (POUs) **for Safety Matters.**"¹ Similarly, ORA states: "California Case Law Supports CPUC Jurisdiction Over Publicly Owned Utilities for **Safety Issues of Statewide Concern.**"² These specific statements assert that the Commission has jurisdiction over "safety matters" or "safety issues of statewide concern" without any qualifications or limitations tied to the underlying asserted statutory authority. Such broad statements lack support and are troubling, considering the wide scope of issues that can conceivably fall under the category of "safety." This interpretation is simply untenable, and a gross expansion of the Commission's lawful authority. Such an interpretation is particularly egregious in the present case, where the legislation at issue specifically references "electrical corporations."³ This express limitation to a specific type of electric utility was deliberately drafted into the law, and was enacted with the legislature's full understanding of the different utility structures and the differences between electrical corporations such as investor owned utilities ("IOUs"), and POUs. Furthermore, municipalities provide a host of public safety services, from police and fire departments, to permitting and building planning. The Commission should not attempt to insert itself into the safety planning activities of POUs and lacks support to do so.

¹ SED Brief at 2.

² ORA Brief at 4.

³ Cal. Pub. Util. Code § 364(a).

B. The Authorities Cited by ORA and SED Do Not Support Their Broad Assertion of Safety Jurisdiction.

As the Joint Parties stated previously, it is a well-established doctrine that “[a]dministrative agencies have only the powers conferred on them, either expressly or impliedly, by the Constitution or by statute, and administrative actions exceeding those powers are void. . . . To be valid, administrative action must be within the scope of authority conferred by the enabling statutes.”⁴ To be exceedingly clear, the Commission must meet the following standard if it wants to support implied powers based on existing statutory authority: (1) for a power to be implied by statute, **“it must be essential to the declared objects and purposes of the enabling act-not simply convenient, but indispensable”**; and (2) **“Any reasonable doubt concerning the existence of the power is to be resolved against the agency.”**⁵

In this case, ORA points to Public Utilities Code Sections 8001-8056. ORA’s Brief states:

For one example of the type of safety regulations relating to transmission and distribution facilities contained in this chapter, take Section 8026 which proscribes that ‘[n]o person shall run, place, erect, or maintain any wire or cable used to conduct electricity, on any pole, or any crossarm, bracket, or other appliance attached to such pole, within a distance of 13 inches from the center line of the pole.’

ORA then cites to Public Utilities Code Section 8037, which provides:

The commission may grant such additional time and shall inspect all work which is included in the provisions of this article, and may make such further additions or changes as the commission deems necessary for the purpose of safety to employees and the general public. The commission shall enforce the provisions of this article.⁶

⁴ Terhune v. Superior Court, 65 Cal. App. 4th 864, 872 (1998).

⁵ Addison v. Dep’t of Motor Vehicles, 69 Cal. App. 3d 486, 498 (1977).

⁶ Cal. Pub. Util. Code § 8037.

ORA concludes with:

Thus, as the plain language of the P.U. Code makes clear, the Commission is tasked with enforcing safety standards as to all electrical supply facilities, including those of publicly owned utilities and rural electric cooperatives, as they fall under the definition of “person” to whom this statute applies.⁷

The subject of this Rulemaking is not construction standards for overhead powerlines, such as those contained in General Order 95. The specific matter before the Commission is the consideration of “rules to address the physical security risks to the distribution systems of electrical corporations.”⁸ Nothing in Sections 8001-8057 expressly relates in any way to “physical security risks.”

Neither Section 8037 nor 8056 grants broad safety jurisdiction to the Commission. Instead, both provide that the Commission may “make such further additions or changes as the [C]ommission deems necessary for the purpose of safety to employees and the general public.” The core limitation of this authority to make “additions or changes” is that it must relate to the express construction-based statutes for overhead and underground powerlines. These provisions do not simply grant the Commission the authority to adopt *any* safety-related requirement that it deems appropriate. There must be a nexus to the underlying statutory provisions. It is simply irrational to infer that, in 1915, the Legislature sought to give the Railroad Commission unlimited safety jurisdiction over all “persons” in the state. Any argument relying on Section 8037 or 8056 must point to the specific statutory provision in either Sections 8026-8036 or 8051-8055 that the Commission is changing or to which it is adding.

⁷ ORA Brief at 3.

⁸ Cal. Pub. Util. Code § 364(a).

The Joint Parties note that no such demonstration is required for regulations applicable to the IOUs because of the clear and broad statutory authority granted to the Commission over IOUs.⁹ The list of statutes giving the Commission expansive authority over IOUs includes Section 364, which is the actual statutory authority for this proceeding. The Joint Parties also note that, if it were not for the attempt to find some conceivable jurisdictional basis for asserting authority over the security decisions of POUs, Sections 8001-8057 would never have been referenced as support for these regulations.

Because there is no express authority for security regulations in Sections 8001-8057, ORA must be asserting that the authority is implied. As stated above, ORA and SED must demonstrate that physical security regulations are “*essential*” to the declared objects and purposes of the enabling act.” Further, if there is “[a]ny reasonable doubt concerning the existence of the power,” then the Commission does not have any authority. This is a very high bar, and neither ORA or SED even attempts to make this showing.

The construction standards specified in Sections 8001-8057 set minimum standards to protect the public from harm *caused by those facilities*. For example, the minimum clearances protect people and vehicles that travel near or under powerlines from harm resulting from contact with those lines. Similarly, guy wires must be insulated to protect the public from electrocution. In contrast, physical security regulations protect against *intrusions into utility facilities*.

Physical security regulations are fundamentally different from minimum construction standards. While minimum construction standards are inherently uniform, physical security solutions can vary widely, including increased law enforcement presence, monitoring requirements, redundant design, and strategic barriers. Indeed, in the case of a POU, local law

⁹ See, e.g., Cal. Pub. Util. Code § 701.

enforcement will very likely be a core part of the planning and response to any such intentional attack. The Commission does not have the implied authority to regulate the interaction between the expert local law enforcement officials and the associated POU. In light of the distinction between security decisions and minimum construction standards, ORA's assertion that the Commission's Decisions on General Orders 95, 128, 165, and 174 support Commission jurisdiction for POUs for "**counter-terrorism hardening**"¹⁰ is truly jarring.

The required standard above is not met because the regulation of physical security is not necessary for implementation of Sections 8001-8057. This is clearly demonstrated by the fact that the original act establishing these provisions is over 100 years old, and the Commission is only now developing such requirements. The adoption and continuing function of General Orders 95, 128, 165, and 174 is not inhibited or reliant on the adoption of these physical security regulations. These General Orders are not dependent on "counter-terrorism hardening."

It is noteworthy that the Legislature just considered this issue and gave very clear and express direction to the Commission: "consider adopting rules to address the physical security risks to the **distribution systems of electrical corporations**."¹¹ POUs do not fall within the definition of "electrical corporations."¹² Senate Bill 699 (stats. 2014) was developed over a two-year period, with numerous hearings, analyses, and amendments. And yet, the Legislature limited the Commission's role to regulations for the IOUs. If the Legislature had intended POUs to fall under this regulation, it would have expressly given that direction. As the Joint POUs previously cited, there are literally hundreds of examples where the Legislature provides parallel,

¹⁰ ORA Brief at 5.

¹¹ Cal. Pub. Util. Code § 364(a).

¹² See Joint Parties Opening Brief at 9-13.

distinct, or identical treatment for IOUs and POUs.¹³ **The Legislature does this deliberately and expressly**, not by only identifying IOUs and then silently hoping that some state agency will look to 100-year old legislation to find some tenuous authority to adopt the same regulations for POUs. Had the Legislature intended for the provisions of section 364 to apply to POUs, it would have stated this expressly. In the absence of such authorization, the Commission may not lawfully assert jurisdiction over POUs for such matters.

II. CONCLUSION

The Joint Parties urge the Commission to reject this continued attempt to expand its jurisdiction over POUs. Instead, the Commission should embrace the continued willingness of the POUs to coordinate and collaborate with the Commission, electric cooperatives, and IOUs to improve industry practices and safety. The Joint POUs appreciate the opportunity to submit this Reply Brief.

Pursuant to agreement of the Joint Parties, CMUA is authorized to sign and file this Reply Brief on behalf of the Joint Parties.

Dated: February 9, 2018

Respectfully submitted,



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¹³ See Joint Parties Opening Brief at 11-15.